NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5372

CHRISTA LABBE,
Petitioner
V.
ATTORNEY GENERAL OF THE UNITED STATES,
et. al.
Respondent

On Petition for Review of a Final Decision
Of the Board of Immigration Appeals
BIA No. A40-136-414
Immigration Judge Grace A. Sease

Submitted Pursuant To Third Circuit LAR 34.1(a)
September 19, 2007

Before: SLOVITER, SMITH and GARTH, Circuit Judges
(Filed September 21, 2007)

OPINION

SMITH, Circuit Judge

Christa Labbe is a native and citizen of Haiti. She entered the United States in 1986 and lived with her maternal aunt. She returned to Haiti in July of 2003 and upon reentering the United States later that month was found to be inadmissible as a criminal alien under 8 USC section 1182(a)(2)(A)(i)(I) for having committed a crime involving moral turpitude.[1] At a hearing before an immigration judge ("IJ"), Labbe conceded that she had been convicted in 1991 in New York State of first degree manslaughter for killing her newborn son by means of strangulation, and that she was removable. To avoid deportation, Labbe sought relief under former section 212(c) as she had been a lawful permanent resident for many years and had not been incarcerated for more than five years.

Because Labbe could not be considered for bail, the IJ granted counsel's request to schedule her case in short order. During a hearing in November of 2003, ti was evident that
medical documentation regarding Labbe's condition at the time of her child's birth would be helpful in adjudicating her claim. Yet counsel failed to adduce any such records during the hearing in December of 2003. After additional testimony was taken, the IJ directed counsel to obtain a release for Labbe's medical records. Thereafter, counsel sent a request to the IJ to issue

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[1] Though the record also shows that Labbe traveled outside of the US twice in 2002, it is unclear why Labbe was not denied admission back to the U.S. on either of those two occasions.

subpoenas to three hospitals. The immigration court completed the subpoenas based on information provided by counsel and returned them to counsel to serve upon the hospitals. The subpoenas mirrored the information supplied by counsel. As a result, Labbe was identified by only her name and her immigration file number.

One hospital responded that it had no records for Labbe. The second hospital asked for additional information to identity whether it had any records for Labbe. The third hospital did not respond. Those responses were provided to counsel shortly before the final hearing in January 2004. Despite counsel's awareness that the responses were less than complete, no request was made for a continuance. Thereafter, the IJ issued a decision denying Labbe's request for discretionary relief under former section 212(c).

Labbe filed a timely appeal with the Board of Immigration Appeals ("BIA"). She did not challenge the denial of her application for relief under former section 212(c). Instead, she asserted that the IJ erred by failing to sua sponte grant a continuance which would have allowed counsel to obtain the desired medical records. Labbe requested that the BIA remand her case for further proceedings. The BIA denied the request, explaining the Labbe had failed to establish that these medical records were unavailable as required under 8 C.F.R. section 1003.2(c), and that such records even contained information that would be helpful to her claim.

Labbe did not file a petition for review. Instead, slightly more than thirty days later, she filed a petition

under 28 U.S.C. section 2241 in the District Court. Consistent with the REAL ID Act, the petition was transferred to this court and treated as a petition for review. See *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3rd Cir. 2005).

Before us, Labbe argues that the BIA erred by dismissing her appeal as it failed to provide any legal analysis of the IJ's decision denying her application for relief under former section 212(c). As a result, she contends her right to due process was violated. Labbe further asserts that the BIA erred by concluding that she did not adduce a good reason for failing to produce her medical records and by denying her request to remand for further proceedings. The government contends that we lack jurisdiction to review Labbe's petition on several grounds.

We agree with the government that jurisdiction is lacking. Labbe petitions for review of the IJ's denial of her application for relief under former section 212(c), a discretionary benefit that was available prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act. See *I.N.S. v St. Cyr*, 533 U.S. 289, 325 (2001) (observing that "section 212 (c) relief is discretionary"). Section 1252(a)(2)(B)(ii) strips the courts of appeals of jurisdiction to review "any other decision or action of the Attorney General... which is...in the discretion of the Attorney General..." 8 U.S.C. section 1252(a)(2)(B)(ii). Accordingly, we lack jurisdiction to review the IJ's denial of Labbe's application for relief under former section 212(c). *Avendano-Espejo v. Dep't of Homeland Sec.*, 448 F.3d 503, 505 (2d cir.2006)

There is an exception to this jurisdictional barrier in 8 U.S.C. section 1252(a)(2)(D) for petitions presenting "constitutional claims or questions of law..." Labbe has alleged in her brief a violation of her due process rights because the BIA failed to address the merits of the IJ's decision as it pertained to her application for section 212(c) relief. This exception for constitutional claims, however, does not come to her aid because section 1252(d)(1) requires that an alien exhaust her claims. Labbe's notice of appeal to the BIA did not mention the denial of her application for relief under former section 212(c). To be sure, there are occasions where a due process claim need not be exhausted, but in this case Labbe's claim implicated the agency's administrative process and the agency was capable of correcting any procedural error in that regard. Thus, the failure to challenge the IJ's denial of her application for 212(c) relief was fatal and we many not consider this unexhausted claim. *Bonhometre*, 414 F3d at 447-48.

Jurisdiction is also lacking under 8 U.S.C. section 1252(a)(2)(C), which instructs that

" no court shall have jurisdiction to review any final order of removal against an alien who is removalble by reason of having committed a criminal offense covered in section 1182(a)(2)." In *Papageorgiou v. Gonzales*, 413 F.3d 356, 357 (3d Cir. 2005), we reiterated that there are only two predicate facts to establish before applying section 1252(a)(2)(C)'s jurisdictional bar. "[F]irst, whether a petitioner is in fact an alien, and, second, whether he or she is indeed

removable by reason of having been convicted of one of the enumerated offenses" in section 1252(a)(2)(C). Id. Here, there is no dispute that Labbe is an alien. The record before us establishes that Labbe was charged as being removable for an enumerated offense, i.e., a conviction for manslaughter in the first degree, which constitutes a crime of moral turpitude under section 1182(a)(2)(A)(i)(I). Because Labbe does not contest that her conviction constitutes an enumerated offense under this jurisdictional provision, section 1252(a)(2)(C) bars us from reviewing this aspect of her petition.

We recognize that Labbe's appeal to the BIA asserted that the IJ erred by failing to sua sponte grant a continuance to allow more time to obtain the hospital records and that the notice of appeal specifically requested a remand to the IJ. There is a distinction barring a criminal alien's petition seeking a review of the merits of the BIA's denial of her application for relief under former section 212(c) and a petition challenging the denial of a motion to reopen. For that reason, we must determine if the denial of a motion to reopen is reviewable in light of section 1252(a)(2)(C)'s jurisdictional stripping provision.

We have not directly considered whether section 1252(a)(2)(C)'s bar also precludes us from reviewing a motion to reopen a criminal alien's immigration proceedings. In *Cruz v. Attorney General of United States*, 452 F.3d 240 (3rd Cir. 2006), we considered a petition for review of the denial of a motion to reopen by an alien convicted of a crime of moral turpitude. There we were unable to determine if section

1252(a)(2)(C) precluded our review of the motion to reopen because the BIA's decision failed to analyze whether the alien had the predicate conviction for an enumerated offense in light of the state court's vacatur of that conviction. Id. At 247-48. For that reason, we granted the petition for review and remanded the matter for further proceedings.

Nonetheless, *Cruz* is instructive because we observed that, even though an order denying a motion to reopen is generally reviewable, there are:

> certain situations in which jurisdiction-stripping provisions of 8 U.S.C. section 1252(a)(2) limit or eliminate our jurisdiction to review denials of motions to reopen. For example, if an alien is removable for having committed one of the offense enumerated in 8 U.S.C. section 1252(a)(2)(C), we lack jurisdiction to review a denial of a motion to reopen, except to the extent that it raises constitutional claims or questions of law. 8 U.S.C. section 1252(a)(2)(C)(D)...

Cruz, 452F3d at 246-47 (internal footnote and citations omitted)

Consistent with *Cruz*, we conclude that the jurisdiction- stripping provision in section 1252(a)(2)(C) not only precludes us from reviewing the IJ's denial of her application for section 212(C) relief, it also precludes our review of the motion to reopen unless Labbe has raised an issue of law or a

constitutional claim. Neither are present in Labbe's challenge to the BIA's denial of the motion to reopen.[2]

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[2] Labbe alleged in the final paragraph of her argument on the motion to remand that the Board violated her right to due process when it recognized the deficiency in the subpoenas, yet refused to grant relief. This bare allegation fails to state a colorable violation of the United States Constitution. As we explained in *Khan v. Attorney General of United States*, 448 F.3d 226,236 (3rd Cir. 2006), recasting a challenge to a discretionary determination as a due process violation is
inadequate as an alien must show that he was prevented from reasonably presenting his claim and that he was prejudiced as a result thereof. Labbe cannot make either showing. The record establishes that Labbe never sought a continuance from the IJ even though her counsel knew the subpoenas were not productive, and she failed to adduce before the BIA any medical documentation that would have demonstrated that she was prejudiced.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Case No.: 05-5372

CHRISTA LABBE,
Petitioner

V.

ATTORNEY GENERAL OF THE UNITED STATES; SECRETARY OF DEPARTMENT OF HOMELAND SECURITY; THEODORE NORDMARK, Senior Officer Of The Local Branch of Bureau of Customs and Immigration Enforcement,
Respondent

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and GARTH, Circuit Judges*

The petition for rehearing filed by petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this Court

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*The vote of the Honorable Leonard I. Garth, Senior United States Circuit Judge, is limited to panel rehearing.

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in thedecision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
/s/ D. Brooks Smith
Circuit Judge

Dated: November 20, 2007
CRG/cc: Sandra L. Greene, Esq.
Daryl L. Bloom, Esq.

US Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 22041
Decision of the Board Of Immigration Appeals

May 13, 2004

File: A40-136-414 - YORK
In re: LABBE, CHRISTA MARIE
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT:
Kleefield, Claude H., Esquire
ON BEHALF OF DHS:
Maureen C. Gaffney, Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent has appealed from the immigration judge's decision dated January 15, 2004. The respondent seeks a remand for an additional opportunity to provide evidence from hospitals at which she was treated in support of her 212(c) application. On December 20, 2003, the respondent submitted a motion requesting the Immigration Court to issue subpoenas to the hospitals to help obtain the respondent's medical records. The subpoenas were unsuccessful, however, apparently due in part to the subpoenas failure to include the respondent's social security number and date of birth. The respondent has not adequately demonstrated that this evidence was unavailable during the proceedings below, however. See 8 C.F.R. section 1003.2(c)(1). The respondent

first appeared before the Immigration Court on August 20, 2003, indicating an application for section 212(c) relief would be filed and a decision was not issued until January 15, 2004.(Tr. At 5). Additionally, the respondent has not sufficiently indicated what the respondent's medical records will show or how they will affect the respondent's eligibility for section 212(c) relief. Accordingly, the appeal is dismissed.

Frederick D. Hess

For the Board